IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 9TH FEBRUARY 2007 / 20TH MAGHA 1928

CRL.A.No. 1093 of 2004()

AGAINST THE ORDER CC.453/2003 of JUDL.MAGISTRATE OF FIRST CLASS-I, ALUVA

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APPELLANT/COMPLAINANT:

M/S.ASHIQUE ENTERPRISES, C.P.2/320.B,
MANKAYIL, AMBATTU KAVU, THAIKKATTUKARA,
P.O.ALUVA, REP. BY MR.MOHAMMED S/O.MOIDEEN,
KULANGARA HOUSE, VII/286, VELLIMUKKU SOUTH,
MALAPPURAM.

BY ADV. SRI.P.K.IBRAHIM

RESPONDENTS/ACCUSED & STATE:

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1. MR.MOHAMMED RASHEED, S/O.MOHAMMED KUNJU,
KADAVIL PARAMBIL VEEDU, PONNARIMANGALAM DESOM,
MULVAVUKAD VILLAGE, KANAYANNOOR TALUK.

2. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

(RESPONDENT NO.2 IMPLEADED AS PER ORDER DATED 17.11.2006 IN CRL.M.A.NO. 11418 OF 2006)

BY PUBLIC PROSECUTOR SRI. S. DILEEP -R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 1093 OF 2004

Dated this the 9th day of February, 2007

JUDGMENT

This Crl. Appeal is filed against the order in C.C. No.453 of 2003 on the file of the Judicial Fist Class Magistrate's Court-I, Aluva. The appellant filed an application, Crl.M.A. No.1529 of 2007, to hear the appeal at an early date and this Court heard the matter.

2. By the impugned order, the trial court acquitted the accused - first respondent under Section 256(1) Cr.P.C. The impugned order would show that the trial Magistrate passed the order without giving any reason for acquitting the accused. Learned counsel appearing for the appellant submits that the impugned order is not in accordance with the principles laid down by the Apex Court in the decision reported in **Associated Cements Co. Ltd. v. Keshvanand, 1998(1) K.L.T. 179 (S.C.)** and by this Court in the decisions reported in **Don Bosco v. Partech Computers Ltd., 2005(2) K.L.T. 1003** and **G.F.S. Chit & Loans (P) Ltd. v. Rajesh, 2006 (3) K.L.T. 825**.

3. The impugned order would show that the accused was acquitted as the complainant was not present either in person or by pleader. As per Section 256 Cr.P.C. though the courts have the discretion to acquit an accused due to the absence of the complainant, this Court had taken the view in the above decisions that such discretion should be exercised cautiously. That apart, the Apex Court in the decision reported in **Associated Cements Co. Ltd. v. Keshavanand, 1998(1) K.L.T. 179 (S.C.)** held in paragraph 17 as follows:

> "Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The

> discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

4. In the light of the legal principles laid down by the Apex Court as well as this Court in the above decisions, this Court is of the view that the impugned order is not in accordance with the provisions of Section 256 Cr.P.C. In the above circumstances, the order under challenge is set aside and the court below is directed to take back the complaint on file and proceed with the matter in accordance with law.

The Crl. Appeal is allowed as above. The appellant shall appear before the court below on 8.3.2007.

(K.THANKAPPAN, JUDGE)

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